

**FIRST TUESDAY –
THE TEXAS FORECLOSURE PROCESS**

By:
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OVERVIEW

The foreclosure process is simple when compared to most other states. While Texas permits both judicial foreclosure and non-judicial foreclosure, non-judicial foreclosure is the norm. The entire process, from the initial demand to cure through the auction, takes approximately 60 days.

During the foreclosure process, a debtor is typically sent only two notices: (1) Demand to Cure; and (2) Posting Notice. The primary purpose of the Demand to Cure is to provide the debtor with no less than twenty days (typically thirty days) to cure any arrearage. However, most lenders will take this opportunity to advise the debtor that if the note is not cured, the note will be accelerated. The purpose of the Posting Notice is to accelerate the obligation and to give the debtor no less than twenty one days notice of the foreclosure sale date.

Despite the acceleration of the note, most lenders will allow the debtor to reinstate the loan any time prior to the sale by simply paying the arrears. As such, a debtor should not assume the lender will allow reinstatement under those circumstances. On the other hand, review your loan documents since most deeds of trust provide that the borrower has five days before the foreclosure sale to reinstate the loan by simply paying the arrears.

DEFAULT

Before the foreclosure process can begin, there must first be a default. The most common default on a mortgage loan is the failure to make a payment. Other common defaults include the failure to pay the property

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taxes, the failure to pay insurance or the violation of a due-on-sale clause. *Lyons v. Montgomery*, 701 S.W.2d 641, 642-643 (Tex. 1985) (mortgagee² has undisputed right to accelerate note and foreclose where there is a breach of the due-on-sale clause).

DEMAND TO CURE

The foreclosure process cannot begin without a formal Demand to Cure. Texas Property Code § 15.002(d). If the default is other than the failure to make a final balloon payment, the mortgagee will include within the Demand to Cure a notice of intent to accelerate. If the subject property is the mortgagee's residence, the mortgagor must provide the mortgagee written notice by **certified mail** no less than twenty days to cure the default. Texas Property Code § 15.002(d). Despite this twenty day cure period, most security instruments provide a thirty day cure period. As such, unless the mortgagee wishes to face litigation under the Fair Debt Collection Practices Act, the Demand to Cure will afford the mortgagor thirty days to cure any default.

POSTING NOTICE

The mortgagee will send the mortgagor a notice of acceleration in conjunction with a notice of the foreclosure sale, date and time if the mortgagor fails to timely cure the default. The notice of sale (a.k.a. the Posting Notice) must include a statement of the earliest time at which the sale will begin and must be delivered by certified mail to each debtor obligated on the debt. Texas Property Code § 15.002(b).

Note, however, there is no requirement in the Texas Property Code or case law that a debtor obligated on the debt actually receive the foreclosure notice. *Onwuteaka v. Cohen*, 846 S.W.2d 889, 893 (Tex.App.–Houston [1st Dist.] 1993, writ denied). “Service of a notice [of trustee’s sale] by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor’s last known address as shown by the records of the holder of the debt.” Texas Property Code §

² The term “Mortgagee” encompasses the phrase “Mortgage Servicer” as that phrase is defined in the Texas Property Code. Texas Property Code § 51.0001(3)

15.002(e).³ If the property securing the mortgage is the debtor's residence, the last known address of the debtor is the property address. Texas Property Code § 51.0001(2)(A). Non-residential foreclosure notices must be sent by certified mail to the debtor's last known address contained in the mortgagee's records. Texas Property Code § 51.0001(2)(B). The debtor has an affirmative duty to provide the mortgagee notice of any change of address in a reasonable manner. Texas Property Code § 51.0021. January 12, 2005

The foreclosure notice must also be posted at the courthouse or other place designated by the County Commissioner's Court. Texas Property Code §§ 51.002(a) and (b)(1). The foreclosure notice must also be filed with the County Clerk where all or any portion of the subject property is located. Texas Property Code § 51.002(b)(2). The foreclosure notice is not required to be recorded and indexed in the deed records. Texas Property Code § 51.002(f). In fact, the County Clerk is authorized to dispose of the foreclosure notices after the date of sale in the notice has passed. Texas Property Code § 51.002(f).

TIME AND PLACE

All Texas foreclosures are conducted on the **first Tuesday** of every month (regardless of holidays) between the hours of 10:00 a.m. and 4:00 p.m. Texas Property Code § 51.002(a). Further, all such sales must be conducted within three hours of the starting time indicated in the foreclosure notice. Texas Property Code § 51.002(c).

All foreclosure sales must take place in the area designated by the County Commissioner's Court. Texas Property Code § 51.002(a). Typically, this location is on the steps of a specific side of the courthouse. If the property is located in two or more counties, the notice of foreclosure sale must identify the location where the sale will be held. Texas Property Code § 51.002(a).

³ The Fifth Circuit court of Appeals has held that, despite the clear mandate of certified mail in the Texas Property Code, hand delivery of the foreclosure notice was adequate. *Savers Federal Savings & Loan Ass'n v. Reitz*, 888 F.2d 1497 (5th Cir. 1989).

THE FORECLOSURE SALE

The trustee (or substitute trustee) appointed in accordance with the terms of the deed of trust will, prior to the start of the auction, set certain reasonable conditions for conducting the sales. Texas Property Code § 51.0075. Once those procedures and conditions are established the auction will begin and the properties slated for sale that day will be sold to the highest cash (or cash equivalent) bidder at the time and place designated. If the purchaser does not have the requisite sum in cash or cash equivalents, the trustee must give the prospective buyer a "reasonable time" to obtain such funds. *First Federal Savings & Loan Association of Dallas v. Sharp*, 359 S.W.2d 902, 903 (Tex.1962). In that situation, as the phrase "reasonable time" is less than specific, the trustee should announce as one of conditions prior to the start of the auction, what constitutes "reasonable time."

The mortgagee (as does the mortgagor) has the right to bid at the foreclosure sale. The mortgagee may credit bid at the foreclosure sale for an amount equal to, or less than, the amount due on the note. *Habitat, Inc. v. McKanna*, 523 S.W.2d 787, 790 (Tex.Civ.App.–Eastland 1974, no writ) (citing *Thomason v. Pacific Mutual Life Ins. Co. of California*, 74 S.W.2d 162 (Tex.App.–El Paso 1934, writ ref'd)). A credit bid is a cash equivalent.

After the foreclosure sale, the trustee conveys the property to the successful bidder via a trustee's deed, which deed passes title to the purchaser free and clear of all inferior liens. The trustee only conveys that which he has the right to convey. In other words, all warranties of title come from the mortgagor, not the trustee or the mortgagee. The purchaser at a foreclosure sale buys at their own peril *Henke v. First Southern Properties, Inc.*, 586 S.W.2d 617, 620 (Tex.App.–Waco 1979, writ ref'd n.r.e.). The purchaser acquires the property "as is." Texas Property Code § 51.009.

There are special rules involving Internal Revenue Service liens. I.R.C. § 7425; Treas. Reg. § 301.7425-4. If the federal tax lien is senior to the interest of the foreclosing mortgagee, the federal tax lien is superior and survives foreclosure. If the federal tax lien is junior to the interest of the foreclosing

mortgagee, the federal tax lien will be extinguished only if the IRS receives notice of the foreclosure sale at least twenty five days prior to the foreclosure sale date. *Id.* If the twenty five day notice is not properly served on the IRS, the federal tax lien remains on the property after the foreclosure sale. *Id.* Where the federal tax lien is extinguished, the IRS retains a right of redemption for 120 days. *Id.*

Ad valorem property taxes provide additional issues. *Ad valorem* tax liens are superior to any and all interests in the property regardless of recording date. Texas Tax Code §§ 32.04-.06. Moreover, section 32.06 permits the taxing authority, or its assignee, to non-judicially foreclose on the property without notice to any lienholder.

HOME EQUITY LOANS

A Texas home equity loan cannot be foreclosed upon without a court order. A mortgagee that treats the foreclosure of a home equity loan the same as the foreclosure of a traditional mortgage may be liable for wrongful foreclosure and damages under the Texas Deceptive Trade Practices Act.

The Texas Rules of Civil Procedure provide three methods for obtaining the requisite court order. Texas Rules of Civil Procedure 735 and 736. Rule 735(1) provides for judicial foreclosure in the same manner as it has existed in Texas since 1845. Rule 735(2) contemplates either: (1) a declaratory judgment proceeding that enforces the terms of the security instruments or (2) a counterclaim for foreclosure if the borrower files a pre-foreclosure lawsuit against the mortgagee. Rule 735(2) refers to Rule 736 which provides for an expedited foreclosure process.

THE RULE 736 PROCESS

Rule 736 is drafted to operate in conjunction with the regular non-judicial foreclosure process. As with the regular non-judicial foreclosure process, the borrower must be given an opportunity to cure and notice of intent to accelerate. Once the debt is accelerated the mortgagee is free to file an application pursuant to rule 736 in the district court located in the county where the property is located.

The Rule 736 application requires the mortgagee to verify in writing that: (1) the debt exists; (2) the debt is secured by a valid home equity loan that encumbers the homestead; (3) a default exists; and (4) all legal foreclosure notices (under the regular non-judicial foreclosure process) have been given to the borrower. *See supra.*

All persons obligated on the debt must be served, by both regular and certified mail, with a notice of filing an application under rule 736. Rule 736 set forth the form of the requisite notice. The notice must also be sent to the mortgagor's attorney, if he has one. The mortgagor must file a response with the clerk of the court before the Monday following thirty eight days after the notice is deposited in the mail, postage prepaid. If there is no timely response, the court is authorized to sign a default order and no hearing is required. Nonetheless, the court may still requires a hearing.

Once the Rule 736 order is entered, the mortgagee can post the property for sale in accordance with the procedures set forth in Texas Property Code § 51.0001 *et seq.* Notice of the foreclosure sale date, time and place is given to the mortgagor in accordance with Section 51.002 along with a copy of the Rule 736 order. The Rule 736 foreclosure process then proceeds in identical fashion to a regular non-judicial foreclosure sale.

DEFICIENCY JUDGMENT

A mortgagee (not secured by a home equity loan) has two years from the date of the foreclosure sale to file an action for recovery of any deficiency.⁴ Texas Property Code § 51.003(a). The defendant(s) in a deficiency action have the right to request that the court determine the value of the foreclosed property as of the date of the foreclosure sale. Texas Property Code § 51.003(b). If the value of the subject property, as determined by the court, is greater than the amount paid for the property at the foreclosure sale, the court's value is used for calculating any deficiency. *Id.*

⁴ The mortgagee on a Texas home equity loan is not entitled to a judgment for any deficiency balance that may be remaining after the foreclosure sale. Texas Constitution, Article XVI, § 50(a)(6)(C).